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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1592

ARTHUR F. TURCO, JR.,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

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Petitioner herewith replies to the brief of respondent in opposition.

I.

RESPONDENT IGNORES THE COURT'S HOLDING IN LINDSEY v. NORMET, 405 U.S. 56 (1972).

We argued in Point I of our petition that the New York procedures denying any

appeal as of right to attorneys--whereas every other litigant was entitled to one such appeal--violated the equal protection clause as explained in Lindsey v. Normet, supra.

The response to this point (pp. 8-10 of respondent's brief) simply pays no attention to the issue; it neither cites, distinguishes, nor so much as refers to Lindsey.

The only concession to the existence of the issue is respondent's statement that "the legislative classification [does not lack] ... appropriate justification." Respondent, however, does not so much as suggest what that justification may be. And indeed there is literally none which can be cited for singling out lawyers as the only class of persons in the State of New York who have no appeal as of right.

In cases after Lindsey, e.g., United States v. Kras, 409 U.S. 434 (1973) and Ortwein v. Schwab, 410 U.S. 656 (1973), this Court emphasized that in litigation involving solely economic rights legislative differentials as to access to courts could be sustained on a standard of "rational classification," whereas where fundamental rights were involved the standard was one of "compelling governmental interest," 409 U.S. at 446; 410 U.S. 660. This Court carefully distinguished a case where a litigant was merely appealing a denial or reduction of welfare payment from one where a litigant's entire life was involved, as where a divorce was at issue, Bodie v. Connecticut, 401 U.S. 371 (1971). See Kras, 409 U.S. at 444 and Ortwein, 410 U.S. at 659. It would seem clear enough

that a lawyer fighting for his right to continue the practice of his profession is fighting for a fundamental right.

But whether the proper standard for the legislative classification in this case is "rational justification" or "compelling governmental interest," the classification cannot be sustained. We note the respondent gives no argument at all to justify the singling out of attorneys.

We previously called the Court's attention to the fact that this precise issue is pending before a three-judge court sitting in the Eastern District of New York and that the case was argued on March 12, 1975. As of the writing of this reply brief, no decision had been rendered.

II.

THE RESPONDENT IGNORES A MAJOR POINT, NAMELY, WHETHER THE RULE OF BAXTRAM V. HEROLD, 383 U.S. 107 (1966), SPECHT V. PATTERSON, 386 U.S. 605 (1967), AND HUMPHREY V. CADY, 405 U.S. 504 (1972), IS APPLICABLE TO LAWYER DISCIPLINARY PROCEEDINGS.

We argued in Point II that a major issue here was the application to lawyer disciplinary proceedings of the due process requirement that before a collateral consequence of a conviction may be imposed, a hearing was required to determine whether that secondary consequence properly flowed from the conviction.

Respondent entirely ignores this point; indeed, no reference is made either to the point or the cases relied on by

petitioner. Respondent deals with the question of the right to relitigate the conviction; but this is a separate point from the right to a hearing to determine whether a designated collateral consequence should flow from a conviction even if not relitigated.

It should be clear that the Appellate Division adjudicated "guilt" of unprofessional conduct solely on the complaint and the answer, where the only conceded fact was that there had been convictions of misdemeanor of a simple assault and weapons possession on pleas without trial. As the legislature did not provide that such convictions (unlike felony convictions) automatically resulted in disbarment, the court was required to exercise judicial judgment on that question. That is the precise point where a due process hearing was required to determine whether the facts and background of the particular misdemeanor convictions merited any bar discipline. No such hearing was had.

Respondent argues that "petitioner had notice and an opportunity to be heard before collateral consequences were attached to his two convictions" because he was afforded a mitigation hearing. (p. 11) But the mitigation hearing occurred after the finding of "guilt" of professional misconduct. One cannot help but recall:

> No, said the Queen, first the sentence and then the evidence.

III.

RESPONDENT MISSTATES THE ALFORD ISSUE.

We argued that the implications of this Court's holding in North Carolina v. Alford was that at least where the issue in litigation was the collateral consequence of a conviction based upon a plea of guilt accompanied by an assertion of innocence, the individual had a right to prove his innocence.

Respondent's only answer is that this question "was not raised in Alford." (p.10). We acknowledge as much but we pointed out that a failure to extend Alford to this point renders an Alford plea meaningless.

Respondent argues that Alford permits New York to attach "evidentiary weight to the conviction" in a case such as this. (p. 10) But that is not the issue. We do not say that the pleas cannot be considered and given weight by the court in the collateral proceeding. What we do say is that they may not be taken as binding, conclusive and dispositive. We submit that the necessary implication of Alford forbids such a holding. Yet that is precisely what the New York Court held.

IV.

RESPONDENT IN EFFECT CONCEDES THE PETITIONER'S ARGUMENT THAT THE PROCEEDINGS BELOW DENIED DUE PROCESS OF LAW.

We pointed out in our petition that the proceedings below lacked the fundamentals of due process because petitioner was disbarred

a) upon charges not included in the disciplinary complaint;

b) upon assertions of a prosecutor unsupported by evidence and on which there

had never been a hearing; and

c) upon the basis of indictments which had been withdrawn.

The response concedes each of the foregoing:

a) At pages 12 to 14 of the response, respondent argues that petitioner was guilty of bail jumping and that the facts respecting that emerged at the mitigation hearing, and thus "it was a proper subject for . . . consideration by the Appellate Division. . ."(p. 14) even though there was no mention of it in the complaint.

But this is precisely Ruffalo. There this Court held that a disbarment could not be predicated upon a charge which first emerged at the hearing and which was not included in the original charges. Yet respondent concedes that was done here and in some unexplained fashion was justified.

b) At page 12 of its response, respondent contends that:

> It thereby becomes necessary for the Appellate Division to consider the totality of the circumstances of those pleas, including the nature of the underlying charges, the factual foundations offered by the prosecutors, and the prosecutor's reasons, stated on the record, for recommending the acceptance of a plea to a reduced charge.

What kind of due process is afforded when a decision on disbarment is based upon "the factual foundations offered by the prosecutor," in another proceeding when such

foundations were in no way supported by a single word of sworn testimony subject to cross-examination!

c) Respondent insists throughout that petitioner could be disbarred because of charges made in indictments which were withdrawn (pp. 12 to 15). Respondent contends this was permissible because "these matters were integrally related to petitioner's assertions in mitigation" (p. 12). But again that is precisely prohibited by Ruffalo, i.e., a charge post hoc based upon testimony which developed at the hearing. The complaint charged professional misconduct based upon indictments as to which there were convictions. It made no charges on the basis of indictments which had been withdrawn.

It is clear that petitioner in this case was not disbarred because of two misdemeanor convictions. He was disbarred because of what the prosecutor in Maryland claimed he could prove at the time the plea was entered and because of the content of indictments which were withdrawn (e.g., bail jumping in New York and conspiracy to murder in Maryland). It is of the essence of due process that petitioner should have been charged with these items and have had a chance to dispute them. He was denied both.

V.

RESPONDENT'S CONTENTION THAT MR. TURCO DID NOT MAKE AN ALFORD PLEA IN MARYLAND IS BASED UPON MISLEADINGLY EXCERPTED PORTIONS OF THE RECORD.

Respondent literally states, referring to the Maryland proceedings, that "The assertion of innocence was stricken from the record" (p.16) and then quotes brief excerpts which it is claimed support that view.

The following is what the record actually shows:

Beginning at page 11 of the Maryland transcript and continuing until page 24, Prosecutor O'Connor stated what her witnesses would testify to if they were called to the stand:

The following colloquy then ensued:

THE COURT: Mr. Buchman or Mr. Kunstler, does the defendant have any evidence to present at this time to controvert the basic contentions of the State, what they propose to prove?

MR. KUNSTLER: Your Honor, in view of the fact that a plea is being accepted , offered and accepted here, I would like to defer comments on my plea prior to sentencing.

THE COURT: I don't think it would be appropriate now. The defendant is offering no evidence.

MR. KUNSTLER: He is offering no evidence at this time.

THE COURT: And nothing to present to the factual question at this time?

MR. KUNSTLER: No, not at this time.

THE COURT: The Court's role, of

course, in accepting a plea of guilty is not only to ascertain the voluntary and intelligent nature of the plea, but also to ascertain that the State's evidence, if established, would provide a factual basis upon which this plea could be founded. Therefore, the Court will accept the plea on the second count of this indictment. Do you wish to present anything by way of mitigation or disposition of the matter? (underscoring supplied)

MR. KUNSTLER: I do, Your Honor . . .
(Tr. p. 24-25)

Mr. Kunstler then proceeded, and after references to Mr. Turco's general character, continued as follows:

> Now, Your Honor, with reference to the particular charges in this situation, Mrs. O'Connor has gone through the State's evidence, and we offered no evidence when Your Honor asked the question, in refutation of those charges in view of the fact we had negotiated a plea for Mr. Turco, but I think in the imposition of sentence, it is only fair to indicate to Your Honor what the defendant would have presented in refuting these charges had he decided not to accept the plea which was negotiated.
> (Tr. p. 28-29)

He continued then for nine pages outlining the various witnesses who would support the defense of alibi. He concluded as follows:

Mr. Turco would have taken the stand. That was our plan, and he would testify to everything he had done that would correspond to what the witnesses said about him.

That is sort of a brief resume of what we would have presented had we gone ahead with the defense in this matter. I might indicate to Your Honor, without, of course, changing Mr. Turco's plea because he has pled guilty to common assault, that his position was throughout this case he was totally innocent of all the charges. He pled not guilty to the indictment. We were tried on the first indictment and there was a hung jury, and his position is essentially the same today. However, it was for that, just as the State does, and now Mrs. O'Connor indicated, there are hazards in trial, particularly when a life is at stake, because of that understanding he has taken the plea which has been offered and accepted by Your Honor.

(Tr. p. 38-39

There then ensued the following colloquy:

MRS. O'CONNOR: Objection. At this point I would like to approach the bench.

(The following took place at the bench).

MRS. O'CONNOR: There was an expressed agreement in chambers, and that's the reason the agreement was made in chambers, which I think

he probably has violated in his dissertation and now is completely violating by stating the reasons for the plea. It is my understanding the defendant would stand mute and he is trying to get in the back door . . .

MR. KUNSTLER: He has certainly stood mute but I think in going into an appropriate sentence, I am entitled to say his position, he is innocent of all the charges. I said that that is his position from the beginning. That has been the extent of it. I think the defendant has not said a word. We have nothing further to say about it anyway.

THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.

MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.

THE COURT: I think you said Mr. Turco would testify he is completely innocent of any wrongdoing.

MR. KUNSTLER: His position is he is innocent. He would testify what he did and where he was. I gave the evidence his witnesses would have given. I said his position is he is innocent but accepting the plea to avoid further litigation.

MRS. O'CONNOR: That's the exact issue we went over this morning.

MR. KUNSTLER: I understood he would take no position on the stand.

THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong, and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

(Tr. 39-42)

MRS. O'CONNOR: Correct. We would ask the entire portion starting "if Mr. Turco were called to the stand . . ." be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

MR. KUNSTLER: I would agree to that.

(Proceedings at the bench were terminated.)

THE COURT: Would the State please repeat its position made at the bench.

MRS. O'CONNOR: The State would request that the portion of the transcript be deleted from the last witness stated by Mr. Kunstler, whom I believe was Mr. Clark's testimony as Mr. Clark would give it, from there on out the State would request any testimony given by Mr. Turco, any reason asserted by Mr. Kunstler on behalf of Mr. Turco be deleted from the record.

MR. KUNSTLER: I have no objection.

THE COURT: The record will disclose Mr. Turco individually is making no assertion concerning his own participation in the case. Is that correct?

(Tr. 41-42)

It is evident from the foregoing that the issue debated before the court was

whether Mr. Kunstler would be permitted to include in his recitation a statement of what Mr. Turco would personally testify to if he took the stand. Mrs. O'Connor objected to that and, on being pressed, Mr. Kunstler withdrew that particular portion of his statement. This is unmistakeable as it appears from the colloquy quoted supra.

Thus, everybody in the courtroom in Maryland understood that the issue was about whether there would be a statement of what Mr. Turco personally would say if he took the stand. There was no objection at all to Mr. Kunstler's recounting of the defense of alibi as it would emanate from other witnesses.

It is completely clear that in Maryland the petitioner, through his counsel, persisted in his assertion of innocence.

VI.

RESPONDENT'S BRIEF COMPOUNDS THE BASIC UNFAIRNESS OF THE PROCEEDINGS BELOW.

At several points in respondent's brief statements are made which would not have been made had the elements of fundamental fairness been respected

a) we note the following statement in the last paragraph of page 11 of respondent's brief:

> His pleas were supported by strong evidence of actual guilt.

There was not a single iota of evidence let alone strong evidence. There was an unsupported prosecutor's statement which was disputed. If there was evidence, it was that which was produced at the first trial where the main witness' testimony was stricken by the judge as being incredible! (See note 3, p. 11 of Petition for Certiorari).

b) we note that in the second paragraph of page 7 of its brief respondent contends that at the hearing before Judge Smith "Mr. Turco presented...testimony as to his asserted innocence of the charges which were the basis for his convictions in Maryland and New York City."

Respondent knows that precisely because the Appellate Division had held before the hearing that petitioner had no right to prove his innocence, he did not offer proof of innocence before Judge Smith other than his personal denials. How could he offer the testimony of the

numerous witnesses supporting him after the Appellate Division had in advance ruled out their testimony.

These types of misstatements as well as the suggestion that there was not in Maryland a contention of innocence which remained on the record (Point V, supra) reflect the fundamental deficiences of the entire proceeding. Throughout, petitioner has been dealt with as if the record were something different from what it is - as if he had actually committed a murder in Maryland. This appears not only in respondent's brief but in the opinion of the Appellate Division.

We do not believe such misstatements of the record would have been made had there been a decent regard for procedural fairness.

VII.

THE QUESTIONS PRESENTED MERIT THE ATTENTION OF THIS COURT.

A. Respondent argues that "substantive issues" involved in disciplinary New York attorney proceedings are outside the scope of this Court, "once it is clear that the elements of due process have been afforded petitioner" (P. 18). But that of course begs the question; the case before this Court involves precisely questions as to a denial of procedural due process.

B. Respondent contends that questions of due process in attorney disciplinary proceedings have been adequately addressed in In re Ruffalo and that there are no compelling reasons to reassert those

guidelines. This case is the best proof of the need to demonstrate the reach of the principles of Ruffalo.

C. Lastly, the respondent contends that the circumstances of this case are unique and therefore do not require the attention of the Court. Whether or not this or any other case is unique is not the point: The procedural issues involved in this case are far from sui generis; they pervade the entire field of lawyer disciplinary proceedings and, as demonstrated by our extensive citations to other state statutes (pp. 18-19 of the petition) are of most general application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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